HEARING WOMEN

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On Monday, October the 7th of 1992, many anticipated that the confirmation vote on Clarence Thomas for the position of Associate Justice of the United States Supreme Court would go forward, as scheduled, on the following day. That morning, I received a call from another woman law professor. She told me that the press had just reported that Anita Hill, a professor of law at Oklahoma University and a former employee of the Equal Employment Opportunities Commission, had made accusations of sexual harassment against Clarence Thomas, for whom she had worked directly when he was the nation's chief official in charge of enforcing anti-discrimination laws. Preliminary responses from the Senate indicated a disinclination to postpone the scheduled vote.

My caller said that we needed to "do something"—and we, like many other people across the country, did. Within ten hours, some 120 women law professors signed a letter directed to each member of the Senate Judiciary Committee. We urged the Senate to postpone the vote, to "take this matter seriously" and to begin full investigation.[1] Early the

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I write about events in which I participated. In the fall of 1991, I helped Anita Hill obtain legal advice and worked on the Ad Hoc Committee on Public Education on Sexual Harassment. In 1987, I testified against the nomination of Robert Bork. In addition, I am a member of the Ninth Circuit Task Force on Gender Bias and on the Executive Committee of the Section on Women in Legal Education of the American Association of Law Schools.

1. Letter from Women Law Professors to the Senate (October 7, 1991) (on file with the author); *see also* Maureen Dowd, *The Thomas Nomination: The Senate and Sexism*, N.Y. TIMES, Oct. 8, 1991, at A1 (Katherine Bartlett, Duke law professor, sent letter, signed by many, to the "Senate leadership . . . calling on them to . . . 'fully and publicly' investigate [the] accusations . . .").

next day, Tuesday the 8th of October, another letter, from some 170 women and men law professors, also argued for delay.[2] The voices of law professors joined a chorus of other groups and individuals; the image the newspapers gave us was of seven Congresswomen marching up the steps to the ninety-eight men and two women of the Senate and demanding a delay.[3]

The spontaneous political energy worked. The outrage mounted as the Senate appeared willing to ignore claims that the person in charge of sexual harassment policies was himself a sexual harasser. On Tuesday, October 8th, the vote on the confirmation was delayed one week—until October the 15th. Also announced was the plan to hold a "hearing," to start on Friday, October the 11th, which was also the beginning of the Columbus Day holiday weekend. Thus, on Thursday, October 10—the day before the hearing—Anita Hill met for the first time with the small group of volunteer lawyers who had been assembled over the preceding few days.[4] The following day, she went before the Senate and, via the televised proceedings, the nation.

I begin this commentary with the events of October 7th because I think it important to remember that on that date, Congress wanted to ignore the statements of Anita Hill. But for collective political pressure, the vote would have occurred as scheduled, presumably with a confirmation vote of fifty-eight to forty-two. I believe it important to *mark* the delay—the moment in which, ostensibly, reconsideration of the nomination was on the agenda—for it denotes both the limits and the power of women's concerns. In one sense, the short delay and the minimal role women played in shaping the "hearing" that followed underscore the little power that women have. At the same time, the confirmation delay demonstrates a new significance for accusations that judicial nominees (and implicitly other political appointments and office seekers) have caused harm to women. The "hearing" about Anita Hill's testimony needs to be placed in the context of earlier confirmation disputes, to

2. Professors Norman Dorsen and Frank Michelman were principle organizers of the letter which "strongly urged[d] the Senate to delay action . . . until it could make a fully informed and considered appraisal of Professor Hill's allegations." Letter from Law Professors to the Senate (Oct. 8, 1991) (on file with the author).

3. Maureen Dowd, *The Thomas Nomination: 7 Congresswomen March to Senate to Demand Delay in Thomas Vote*, N.Y. TIMES, Oct. 9, 1991, at A1 (included were Barbara Boxer (California); Nita M. Lowey (New York); Patsy T. Mink (Hawaii); Eleanor Holmes Norton (nonvoting Delegate, District of Columbia); Patricia Schroeder (Colorado); Louise Slaughter (New York); Jolene Unsoeld (Washington)).

4. *See* Marianne Lavelle, *Legal Counsel for Anita Hill Had Uphill Battle*, NAT'L L.J., Oct. 28, 1991, at 22.

examine how "qualifications" for the Supreme Court have changed. The attention paid to the nominations for the Supreme Court needs to be contrasted with the inattention paid to the nominations of the hundreds of lower federal judges, all of whom also are appointed for life.

Finally, just as "women's issues" are starting to have relevance to an evaluation of the qualification of presidential appointees, "women's issues" are beginning to be on the agenda of courts. Specially-chartered commissions are seeking to learn how gender affects decision making, procedure, and outcomes in courts. The conclusions reached by some state court task forces on gender bias document that the inability of some members of the Senate to hear Anita Hill is paralleled every day in courts around the country, where judges do not listen to or hear women. Yet in those courts, as in the Senate, some are starting to think about learning how to hear women.

First, the limits of this "victory." The delay was far too short, and the "hearing" was unfair. Throughout the "hearing," two members of the Senate Judiciary Committee—Senators Hatch and Specter—acted as lawyers for Clarence Thomas. No member of the Committee took a comparable role to represent Hill. The televised inequalities were amplified by the lack of parity behind the scenes. Working on behalf of Thomas were the White House, the Department of Justice, and scores of others; working on behalf of Hill was a small crew of volunteers, scrambling to find phones, fax machines, and information.

In one sense, the Thomas-Hill dynamics resembled, indeed were, the paradigm of sexual harassment cases. He, the "employer," had resources, authority, access, and a presumption of credibility. She, the "employee," had few resources and little access. Yet in all but *this* sexual harassment case, the issue is not whether the alleged accuser will sit on the United States Supreme Court, and the television cameras are not recording the witnesses. Further, in sexual harassment cases, we imagine and aspire to decision makers sitting independent of the parties: to a judge who can hear the claims and be committed to assessing the credibility of the witnesses, to taking expert information when appropriate, and to finding facts.[5] Indeed, as the law of sexual harassment has developed, some judges have even been willing to consider the viewpoint of the woman and to ask what a "reasonable woman" would have understood and experienced.[6]

5. *See* Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1491-1521 (M.D. Fla. 1991) (128 findings of fact).

6. *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1990).

In contrast, the members of the Senate Judiciary Committee were not judges but combatants, struggling to keep an image of impartiality as they occupied many postures at once.[7] Moreover, the resource imbalances between Thomas and Hill were echoed on the Judiciary Committee. Republican staff had their information augmented by White House assistants and many others. Democratic staff cast about for volunteers who helped, worked, ad hoc and sleeplessly, over the holiday weekend to assist Anita Hill. While real judges are sometimes faced with parties who have resources in excess of the judiciary, real judges have mechanisms (such as control over scheduling events) to enhance their capacity to be in charge. In the Thomas "hearings," no judge imposed any constraints on strategic exploitation; the Republicans used resources, time, and hostility to overwhelm the Democrats.

Some read the events of that week as a testimony to power and resources. Judge Thomas is now Justice Thomas. But there is more to be seen in the eight days than the power of those with resources. The power of the relatively less privileged was also impressive.[8] Within three days of October 7th, an "Ad Hoc Committee on Public Education on Sexual Harassment" had been formed, and each member of the Senate received a "fact sheet" on the perceptions and the facts of sexual harassment.[9] More than six hundred women from diverse academic disciplines joined together in attempting to inform Congress and the nation about the impact of sexual harassment on our lives. Despite the holiday weekend and the efforts by Thomas supporters to chill those who had already opposed his nomination from vocally joining in supporting Hill, six senators did change their votes,[10] resulting in the narrowest confirmation approval in this century and the most negative votes that any confirmed

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7. *See* Dennis E. Curtis, *The Fake Trial*, 65 S. CAL. L. REV. 1523 (1992).

8. As Anita Hill has subsequently described, almost all who participated were relatively privileged: she was a holder of tenure at a university, and many of those who helped her shared her status. Speech of Professor Anita Hill, upon being honored by the Section on Women in Legal Education of the American Association of Law Schools, San Antonio, Texas (Jan. 6, 1992).

9. Included, for example was:

> PERCEPTION *Sexual harassment is not all that common, especially in professional work-settings. Hence the likelihood of Prof. Hill's allegations being true is low.* FACT ACCORDING TO THE MOST CONSERVATIVE ESTIMATES, 1 IN 4 WOMEN EXPERIENCE SEXUAL HARASSMENT AT SOME TIME DURING THEIR WORKING CAREERS. A study commissioned by Congress in 1981 found that 40 percent of female federal employees reported being sexually harassed on-the-job; when the study was repeated in 1987, the results were virtually identical.

Ad Hoc Committee on Public Education on Sexual Harassment, Fact Sheet on Sexual Harassment (Oct. 1991) (on file with the author).

10. Three Democrats (Joseph I. Lieberman of Connecticut, Richard H. Bryan of Nevada, and Henry Reid of Nevada) who had been supportive of Thomas changed their votes; three other Democrats (Bob Graham of Florida, Daniel Moynihan of New York, and Robert Byrd of West Virginia)

nominee has ever gotten.[11] In the face of the unbridled willingness of supporters of Thomas to attempt to smear Anita Hill,[12] truth was heard by many people, who now speak of a new awareness of the position women hold in workplaces and homes and of some understanding that that position is not uniform for all women, but varies with race, class, and sexual orientation.[13] And, in many quarters, Hill is honored.[14]

Not only is it important to record the events as a mark of the progress women have made in the political sphere, it is also important to link the events of Anita Hill with precedents that have helped to change the criteria for high visibility presidential appointments. Not very long ago, it was permissible in politics, law, and the popular press to trivialize women and the problems we face. What today is sexual harassment was a few years ago just "the way it was." The "it" here refers both to jobs and personal relations. The terms and conditions of life for many women included, at the least, a verbal barrage of sexual comments. The challenge to that attitude can be marked in many forums and is of a piece with the contemporary women's movement. "It" became "sexual harassment," "violence against women," "date rape," "discrimination," and a host of other terms that have helped to name experiences and to link these private moments of discomfort, pain, and terror to political and legal wrongs.

The idea that nominees to high office should be responsible for (and could be questioned about) their conduct towards women is of very recent vintage. In the context of nominations to the United States Supreme Court, the debates about Robert Bork's nomination were, in my knowledge, the first in this century in which *women's* issues moved to center stage.[15] For example, one of the controversial decisions of then-

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who had "hinted" support for Thomas also voted against him. R.W. Apple, Jr., *The Thomas Confirmation*, N.Y. TIMES, Oct. 16, 1991, at A1.

11. *Id.* ("Not since Lucius Q.C. Lamar of Georgia, controversial as a Southerner while memories of the Civil War were fresh, has anyone moved into the Court with a confirmation margin as narrow as Judge Thomas's.").

12. *See* Leslie H. Gelb, *Untruths . . .*, N.Y. TIMES, Oct. 27, 1991, § 4, at 15 ("Washington is largely indifferent to truth . . . . Sure, politics is the natural order of things. Yes, truth is elusive. But if a free people tolerates endless untruths, darkness descends permanently.").

13. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. L. FORUM 139.

14. For example, in San Antonio, Texas on January 6, 1992, Anita Hill was given an award by the Section on Women in Legal Education of the American Association of Law Schools, and was also invited to give the 1992 "Dean's Lecture" at Yale Law School.

15. For discussion of earlier confirmation disputes, see JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT (1991); Robert F. Nagel, *Advice, Consent, and*

Judge Bork was when, as a member of a panel on the Court of Appeals for the District of Columbia, he wrote a unanimous opinion upholding a company's policy that required women of childbearing potential to be sterilized if they wanted to hold jobs exposing them to chemicals alleged to cause harm to reproduction.[16] At the confirmation hearings, the question was less one of whether the opinion was correct as a matter of law, but more whether the text had acknowledged the outrageous option put to women workers: be fired, demoted, or sterilized. Judge Bork's opinion characterized the company's plan as an attempt to deal with a "distressing" problem, and, rather than fire the women, the company had given them the "unhappy choice" of sterilization.[17] When questioned, Judge Bork commented that "some of the [women], I guess, didn't want to have children."[18] Discussion also focused on *Griswold v. Connecticut*,[19] which had challenged a statute making it a crime to prescribe contraceptives. Robert Bork had called the statute a "nutty law," and then, at the hearings, described the case as an "academic exercise."[20] Again, the concern was that, if not cavalier, the discussion did not respond to the somber realities of women's lives. Finally, in an opinion on sexual harassment, Judge Bork wrote of "sexual dalliance[s]"[21] and "sexual escapades"[22]—appearing to make light of an atmosphere in which sexual compliance is required.

Recall that much of the discussion about the Bork nomination, both before and after the hearings, centered on what were the *relevant* questions. One major debate was about the role of the Senate; could it really ask questions or was "advice and consent" supposed to mean consent? If

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Influence, 84 NW. L. REV. 858 (1990); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988).

16. Oil, Chem. & Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). The underlying issue was resolved by the United States Supreme Court in Automobile Workers v. Johnson Controls, 111 S. Ct. 1196 (1991) (given the evidence of potential harm of exposure to lead to the reproduction systems of both men and women, Title VII and the Pregnancy Disability Act prohibit employers from banning women of childbearing capacity from certain jobs).

17. 741 F.2d at 450.

18. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Judiciary Committee*, 100th Cong., 1st Sess. 468 (1987) [hereinafter *Bork Hearings*].

19. 381 U.S. 479 (1965).

20. *Bork Hearings*, *supra* note 18, at 114, 243; Stuart Taylor, Jr., *Bork Tells Panel He is Not Liberal, Not Conservative*, N.Y. TIMES (Conn. ed.), Sept. 16, 1987, at A1. *See generally*, Andi Reardon, *Griswold v. Connecticut: Landmark Case Remembered*, N.Y. TIMES (Conn. ed.), May 28, 1989, § 12, at 6.

21. Vinson v. Taylor, 760 F.2d 1330, 1330 (D.C. Cir. 1985) (Bork, J., dissenting from the suggestion for rehearing *en banc*), *panel opinion aff'd in part and rev'd in part sub. nom.* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

22. 760 F.2d at 1332.

one thought the Senate could take a substantive role, the next brouhaha was about what *qualifications* were relevant to holding the office of judge; dare one actually ask about "judicial philosophy" or were "judicial temperament" and "professional competence" the only permissible topics? Reviewing the nominations since Bork, one finds that the first question, on the Senate's role, seems to have been settled (at least within this short time frame). The Senate asks questions and the nominee responds, some of the time. The second issue—what questions get asked and/or answered—remains contested.[23]

But whether coming under the categories of "philosophy," "temperament," or "professional competence," a nominee's conduct and attitude towards women (who are often assumed to constitute a unitary category, rather than understood as themselves diverse in some respects) have moved onto the agenda. Commentators studying the Bork hearings remarked on the feminist voices, heard repeatedly during those hearings.[24] Many witnesses questioned the nominee's trivializing responses and his interpretations of constitutional doctrine that would have excluded women from the protections of the Fourteenth Amendment. Moreover, "women's issues" have not only been a factor in the context of the Bork proceedings. Months later, when Anthony Kennedy was nominated, he was questioned about his involvement in clubs that excluded women.[25]

The appearance of "women's issues" has not been accompanied by a nuanced understanding of the many women in the category of women. As was apparent last fall, some women are also African-Americans. While women of all colors, classes, religions, and sexual identities have learned not to equate their own experiences with those of all women, we have been less successful at transforming that understanding into effective political action. In the debate over Robert Bork, women and blacks were allied, and political power emerged from that alliance.[26] In the

23. In addition, the President is attempting to increase his control over the information provided to the Senate. *See* David Johnston, *New Rules Are Said to Be Stalling Confirmations*, N.Y. TIMES, Jan. 20, 1992, at A12. On the Senate's role, see Charles L. Black, *A Note on Senatorial Considerations of Supreme Court Nominees*, 79 YALE L.J. 657 (1970).

24. *See generally* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935 (1990).

25. *Supreme Court Nominee Anthony M. Kennedy Said He Doubts Whether Congress Has the Power to Strip Jurisdiction . . .*, L.A. TIMES, Jan. 22, 1988, § I, at 2.

26. Several southern senators understood their political debt to Jesse Jackson's voter registration campaign. *See* BRONNER, *supra* note 24, at 286 (John Breaux of Louisiana and Wyche Fowler, Jr. of Georgia "had been elected with a minority white vote and more than 90 percent of the black vote.").

debate over Clarence Thomas, women and blacks intersected but had no longstanding joint political organization that linked race and gender and was dedicated to understanding the intersectionalities, as Kimberle Crenshaw puts it,[27] on which to build.[28]

To the extent one can then claim progress—and I do call it that—it is both limited and not accidental. It is not an artifact of the particular nominees of the last few years or of the occasionally vivid insensitivity to or oppression of women. Women have gotten themselves into the category of "relevance" by working at it. Beginning in the late 1960s and early 1970s, women lawyers pressing cases on discrimination found that courts were not only a place for hearing such claims but were also places of discrimination. The Legal Defense and Education Fund of the National Organization for Women (NOW) created the National Judicial Education Project (NJEP), which was committed to educating judges about discriminatory assumptions and views, and which developed a program, in cooperation with the National Association of Women Judges (NAWJ), about "gender bias in the courts."[29] In 1982, the Chief Judge of New Jersey committed that state to a study of gender bias.[30] On August 4, 1988, the Conference of Chief Justices of the State Courts resolved that "positive action by every chief justice to address gender bias and minority concerns in the state courts" was needed,[31] and, by the fall of 1991, some thirty-three jurisdictions had put gender bias on their agendas.[32] Thus, judges who had traditionally sat behind a mask of assumed neutrality committed themselves to a relatively radical inquiry aimed at recognizing institutionalized bias.

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27. *See* Crenshaw, *supra* note 13; *see also* Linda Greene's presentation, at the 1992 Annual Meetings of the Association of American Law Schools, on Feminist Procedure, Joint Session held on Jan. 5, 1992, by the Section on Civil Procedure and the Section on Women in Legal Education, in which she discussed the absence of institutional reform litigation directed at the problems of women of color.

28. Such organizations may be in formation. A group, "African American Women In Defense of Ourselves," provided commentary in an advertisement in the *New York Times*, Nov. 17, 1991, Campus Life Section, at 53. (Ad "represents a grassroots initiative of the 1603 women of African descent whose names" were listed.)

29. Norma J. Wikler, *Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts*, COURT REV., Fall 1989, at 6, 8-9. Dr. Wikler was the first director of the NJEP.

30. NEW JERSEY SUPREME COURT, TASK FORCE ON WOMEN IN THE COURT, REPORT OF THE FIRST YEAR (June, 1984).

31. *Conference of Chief Justices, Resolution XVIII: Task Force on Gender Bias and Minority Concerns*, COURT REV. Fall 1989, at 5.

32. *See* Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L. REV. 237, 247 (1989).

The federal courts have been slower to take on the issue of discrimination within the court system. It was not until June of 1990 that the Court of Appeals for the District of Columbia appointed the first committee in any federal court to explore gender and race bias. Clarence Thomas was its chair, and at the time of his confirmation, no committee report had been made. Also in the summer of 1990, the Judicial Conference of the Ninth Circuit resolved to study the impact of gender on the federal courts, and in the summer of 1992, its work will result in a preliminary report. As of this writing, questionnaires have been sent to all the judicial officers and to some 6500 lawyers throughout the Ninth Circuit. In addition, advisory research groups are exploring if and how gender affects decisionmaking in an array of substantive areas (bankruptcy, federal benefits, criminal law, immigration, federal Indian law, and labor), and local working groups in Seattle, San Francisco, Los Angeles, and Phoenix are conducting focus group research.[33]

The growing consciousness of the impact of gender on decisionmaking might well have informed the Senate Judiciary Committee, as it listened to the testimony of witnesses last fall. Here, the pictorial referent is the image of the Senate Judiciary Committee during the hearings: fourteen men, all white, surrounded by aides, a few of whom were women, again mostly white. That image, with only slight modification, fits the reality of many federal and state courts across the country. As of June of 1991, the ninety-four federal trial courts had 758 sitting, life-tenured judges—of whom 705 were men and fifty-three were women.[34] As of that date, sixty of those courts had no life-tenured women judges.[35] As of last June, four of the thirteen courts had no women appellate judges.[36] Were I creating, rather than reporting, these data, I would not have described either women or men as a unitary category. Unfortunately, the Equal Employment Office of the United States Courts divides its published data into information on "men" and "women," and then on people who are "white," "black," "hispanic," "asian," "american indian" and

33. Memorandum from the Honorable John Coughenour (chair of the Task Force) and Mark Mendenhall, Assistant Circuit Executive of the Ninth Circuit (Jan. 21, 1992) (on file with *Southern California Law Review*). For a discussion of why the federal judiciary has been slower to put gender issues on its agenda, see JUDITH RESNIK, NATURALLY WITHOUT GENDER (forthcoming 1992).

34. *Judges of the Federal Courts*, 923 F.2d at vii-xxx (1991) (This figure includes both "active" and "senior" judges.).

35. *Id.*

36. *Id.* at vii-xxx.

"handicapped."[37] As a consequence, I cannot report on how many persons, such as Anita Hill, have both a gender and a race that make them distinctive minorities within the federal judiciary. Further, the most recent "civil rights" legislation is also described as providing more for racial minorities than for "women, religious minorities, and the disabled."[38]

These numbers reveal the poignancy in the public attention paid to Supreme Court nominations and the relative inattention paid to the nominees at the lower echelons. The Supreme Court, while powerful and able to do much harm or good, is only one place in which federal adjudication occurs. That court issues some 150 opinions a year;[39] the life-tenured appellate judges have a case load of about 40,000, and the federal trial courts hear more than 250,000 civil and criminal actions yearly.[40] One finds even a greater wealth of decision making when considering the work of the appointed-for-terms federal judiciary, which include some three hundred bankruptcy judges and an equal number of full-time magistrate judges.[41] In 1990, more than 725,000 bankruptcies were filed.[42] While once again a predominantly male judiciary, here the percentages of women are slightly higher; women are 12.8% of the federal bankruptcy judges[43] and 18.8% of the magistrate judges respectively.[44] But before assuming that the lower the level, the higher the number of women, consider yet another adjudicative layer, that found in federal agencies. Some 1050 "administrative law judges" work in the Social Security Administration, and fewer than five percent are women, in part because of the affirmative action, provided by virtue of the "veteran's

37. THE ANNUAL REPORT OF THE JUDICIAL EQUAL EMPLOYMENT OPPORTUNITY PROGRAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FOR THE TWELVE MONTHS ENDED SEPTEMBER 30, 1990 (Preliminary Edition) [hereinafter EEO REPORT].

38. Michael Ross, *Bill Rekindles Fight over Bias Suits*, L.A. TIMES, Nov. 27, 1991, at A12. The 1991 legislation provided additional damage remedies for those injured under Title VII and imposed caps, while not imposing similar caps on the revisions made to enhance the remedies provided under 42 U.S.C. § 1981 (1988).

39. *See* 1990 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 103, tbl. A-1 (The Supreme Court issued 146 full and *per curiam* opinions in 1989.) [hereinafter 1990 DIRECTOR'S REPORT].

40. *Id.* at 105, tbl. B (40,898 appeals "commenced during twelve month period ending June 30, 1990"), 133, tbl. C (217,879 civil cases commenced during same period), 174, tbl. D (47,962 criminal cases commenced).

41. EEO REPORT, *supra* note 37, at 8, tbl. I.

42. 1990 DIRECTOR'S REPORT, *supra* note 39, at 238, tbl. F (725,484 bankruptcy petitions "commenced during the twelve year period ending June 30, 1990").

43. EEO REPORT, *supra* note 37, at 8, tbl. I.

44. *Id.* at 7.

preference," for those veterans seeking to become administrative law judges.[45]

The hierarchy of the federal courts, and the inattention paid to appointments at levels below the Supreme Court, has particular import in the context of last fall's events. Clarence Thomas was not a newcomer to the nomination process when he appeared before the Senate in the fall of 1991. He had been nominated *before* to be a judge on the Court of Appeals for the District of Columbia. While a few protested his nomination to that appellate court,[46] many took the attitude that, while not having a record that would commend him to be a jurist, the position was not "important" enough to warrant energetic opposition to confirmation. That was a mistake, not only in retrospect given the particulars of what has transpired, but also at the time—because it devalued the daily experiences of the litigants whose cases are decided not by the Supreme Court but by the appellate courts, and by judges of other lower courts. A nominee's views on women's rights and roles are relevant, whether that person is a nominee for the Supreme Court or for appointment to sit as an administrative hearing officer. Women are litigants in both places and in all the courts in between.

Having reviewed a bit of where we women were on October 7, 1991, and where we are, the title and image of a well-known Gauguin painting comes to mind: "D'oú Venons-Nous, Que Sommes-Nous, Oú Allons-Nous? (Where Do We Come from? What Are We? Where Are We Going?)."[47] Would that I could end this commentary on a cheerful note, confident that the Thomas confirmation was the footnote, and the uproar that surrounded it the main point. But although women's issues are tenuously on the public agenda, hearing what women say and caring about what one hears remains further away. Take one last example, again from the conversation between the Congress and the federal courts.

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45. *See* 5 C.F.R. § 930.203 (1990); John C. Holmes, *ALJ Update: A Review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges*, 38 FED. BAR NEWS & J. 202 (1991); Memorandum from Joan Schaffner (Apr. 30, 1991) (on file with author).

46. *See Clarence Thomas Easily Confirmed to Appeals Court for D.C. Circuit*, 46TH ANN. CONG. Q. ALMANAC, 102D CONG., 2ND SESS. 518-519 (1990) ("nomination drew criticism from the National Council on Aging and from the Women Employed Institute," but the "anticipated fight failed to materialize"); *see also* Ethan Bronner, *Black Rightist Seen Winning Judgeship Bid*, BOSTON GLOBE, Feb. 6, 1990, at 3 ("No major liberal or civil rights group has taken a stand against Thomas."). On the opposition, see Marcia Coyle, Marianne Lavelle, & Fred Strasser, *Liberals Sound Alarm on D.C. Circuit Choice*, NAT'L L.J., July 24, 1989, at 5.

47. The painting, done by Gauguin in Tahiti in 1897, hangs in the Boston Museum of Fine Arts, and provides an apt visual metaphor, in part because of Gauguin's notorious relationship to women of color.

Several Senators and members of the House are sponsoring pending legislation, called the Violence Against Women Act,[48] that is aimed at responding to the "national tragedy" of violence against women—in homes, in the workplace, and on the streets.[49] The Act has many provisions, including one to create a National Commission on Violent Crime against Women; another to provide states with programs for victims of violence, and a third to respond to violence against women on college campuses.

But what has caught the attention of the Judicial Conference of the United States, the voice of the federal judiciary, are not these aspects but the two jurisdictional provisions of the proposed legislation. One section would provide a federal civil rights remedy to a person who is the victim of a "crime of violence, motivated by gender."[50] Another section would create a federal crime when a person travels across state lines to injure a spouse or intimate partner.[51] In the fall of 1991, the Judicial Conference of the United States adopted a report of its special committee appointed to consider this legislation. While noting that the Conference would like to play a "constructive role in offering its assistance to Congress in the effort to fashion an appropriate response to violence directed against women,"[52] the Ad Hoc Committee argued that violence against women was better handled in the state courts. Providing federal jurisdiction would, according to the report, "embroil the federal courts in domestic relations disputes"[53] and "flood [the federal courts] with cases that have traditionally been within the province of the state courts, particularly in the area of domestic relations disputes."[54]

I am not confident that all of the Violence Against Women Act's provisions are wise. But I am dismayed at how the jurisdictional provisions are debated, for the federal judiciary's commentary underscores how little women are heard. The proposal is to give federal courts power and responsibility in an area particularly relevant to women. As the Senate Report on the Act notes and as we all were reminded this past fall, there are federal civil rights remedies for discrimination suffered by

48. The Violence Against Women Act of 1991, S. 15, 102d Cong., 1st Sess. (1991).

49. COMMITTEE ON THE JUDICIARY, THE VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 39 (1991).

50. S. 15, 102d Cong., 1st Sess. § 301 (1991) ("Civil Rights").

51. S. 15, 102d Cong., 1st Sess. § 2261 (1991) ("Traveling to Commit Spousal Abuse").

52. REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON GENDER-BASED VIOLENCE 6 (1991) (on file with author).

53. *Id.* at 1.

54. *Id.* at 7.

women in the workplace. However, there are no federal statutory remedies aimed at remedying violence against women, which is a form of discrimination against women that has been coated with a veneer of privacy.[55] The federal judiciary's opposition is based on a view that its jurisdiction needs to be preserved for matters in which there are "clear federal interest[s]." That opposition was echoed by the Chief Justice of the United States, who in his "1991 Year-End Report on the Federal Judiciary" urged that "the federal courts' limited role [be] reserved for issues where important national interests predominate,"[56] and that Congress carefully consider the Judicial Conference's opposition to the Violence Against Women Act.[57] Even if one shares the Conference's opposition to altering federal jurisdiction, it is difficult to explain the Conference's lack of an express endorsement of the section of the Act that would authorize funds for studying and educating the federal judiciary about gender bias.

Quietly and bravely, Anita Hill spoke truth to power. Women had the power to walk up to the Senate Office Building, to fax, phone, and write, and to help her receive a "hearing." Some people had the capacity and willingness to hear, but what state Gender Bias Task Force Reports describe to be true of courts was replicated in the Senate. In 1986, the Report of the New York Task Force on Women in the Courts concluded, that "Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference, and hostility."[58] In the fall 1991, only occasional breaks in the clouds suggested that the weather might ever change.

55. One caveat may be in order, depending upon how the Supreme Court decides NOW v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub. nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (whether the federal courts have jurisdiction over claims of discrimination by women invoking 42 U.S.C. § 1985(3) (1989) as protecting their right to seek access to health care facilities that perform abortions).

56. William Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THIRD BRANCH 1, 2 (1992).

57. *Id.* at 3.

58. *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 15, 17-18 (1986-1987).